[redacted]

[redacted]

[redacted]

QUESTION PRESENTED

Can a State impose a non-discriminatory Compensating Use Tax on a domestic Company which has catalogs printed out-of-state and controls their delivery by mail to its in-state customers, free of charge, where the State law provides a) that ownership by the Company of the catalogs is not dependent upon possession, and b) that ownership by the Company continues until the catalogs are accepted by the Company-designated donee.

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No. 87-267

—o—

In The

Supreme Court of the United States

October Term, 1987

—o—

D. H. HOLMES COMPANY, LTD.,

Appellant,

versus

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,

Appellee.

—o—

**ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT,
STATE OF LOUISIANA**

—o—

BRIEF OF APPELLEE

—o—

STATUTES INVOLVED

The following constitutional, statutory and regulatory provisions involved have been printed in the Appendix.

United States Constitution

Art. 1, Section 8, clause 3

Amendment 14, Section 1, clause 3

Louisiana Revised Statutes

R.S. 47:301 A Definitions
R.S. 47:302 A Imposition of tax
R.S. 47:303 A Collection
R.S. 47:321 A Imposition of (additional sales) tax

Louisiana Civil Code

L.C.C. Art. 481 Ownership and possession distinguished

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§ 912.5 Administrative claim; when presented

§ 912.6 Administrative claim; who may file

———o———

STATEMENT OF THE CASE

Statement of the Facts

D. H. Holmes Company, Ltd. ("Holmes") is a Louisiana corporation, founded in 1842. Its principal office is located at 819 Canal Street, New Orleans, Louisiana. (Joint Appendix 67) (hereinafter "J.A. —") Holmes owns and operates department stores at 13 locations in Louisiana (J.A. 68), a majority of which are in New Orleans. (Plaintiff's Exhibit 5, reproduced at J.A. 35-37). (Admitted in evidence, Transcript Record pages 149-150) (hereinafter "Admitted, T.R. —"). Others are in the Louisiana cities of Baton Rouge, Hammond. Houma, Lafayette and in Jefferson Parish. (J.A. 68-69) Holmes has 5,000 employees, 500,000 charge customers, and a million to a million and a half other customers. (J.A. 69)

The State of Louisiana provides substantial services for the benefit of Holmes, its employees and its customers. In Orleans Parish alone, for instance, Louisiana funds public education with direct appropriations to the Orleans Parish School Board in addition to minimum foundation funds of close to $100,000,000 a year; Louisiana pays $4,-800,000 a year for police supplementary pay; Louisiana funds mass transit at close to $5,000,000 a year; Louisiana supports the Audubon Park Zoo with $500,000 a year; Louisiana also allocates money for the judicial systems, firemen, sheriffs' deputies, both civil and criminal, coroners, assessors, district attorneys, and sewerage systems. Other than the zoo, assessors and this large amount for mass transit, all of the other parishes receive comparable funding based upon population, including, of course, those parishes where other Holmes' stores are located. (J.A.

JURISDICTION

The judgment of the Louisiana Court of Appeal was entered on March 16, 1987. *McNamara v. D.H. Holmes Co., Ltd.*, 505 So.2d 102 (La. App. 4th Cir. 1987); Jurisdictional Statement Appendix 2A (J.S.App. 2A). Appellant's application for writ of certiorari to the Supreme Court of Louisiana, timely filed on April 14, 1987,[1] was denied on May 29, 1987. 506 So.2d 1224 (J.S.App. 11A).

Appellant filed its Notice of Appeal to this Court (J.S. App. 23A-26A) with both the Supreme Court of Louisiana and the Louisiana Court of Appeal, Fourth Circuit, and served this notice of appeal on the trial court, the Civil District Court for the Parish of Orleans, on June 29, 1987. Appellant filed a supplemental notice of appeal with the Supreme Court of Louisiana, the Louisiana Court of Appeal, Fourth Circuit, and the Civil District Court for the Parish of Orleans on August 4, 1987 (J.S. App. 27A-31A). Appellant's Jurisdictional Statement was filed on August 14, 1987, within ninety (90) days of the denial of Appellant's writ of certiorari by the Supreme Court of Louisiana. This Court noted probable jurisdiction on November 2, 1987. —— U.S. ——, 108 S.Ct. 283, 98 L.Ed.2d 244.

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 3 of the United States Constitution:

* * * *

[1] La. Supreme Court Rule X, Section 4, Subsection (b) provides, in pertinent part: "The application [for a writ of certiorari] shall be made within thirty days of the mailing of the notice of the original judgment of the court of appeal . . . ."

The Congress shall have the power

* * *

3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes

La. Rev. Stat. § 47:302(A)(2):

> A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:
>
> * * * *
>
> (2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

La. Rev. Stat § 47:321(A) provides:

> A. In addition to the tax levied by R.S. 47:302A and collected under the provisions of Chapter 2 of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950, there is hereby levied an additional tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined in said Chapter 2 . . . the levy of said tax to be as follows:
>
> * * * *
>
> (2) At the rate of one percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed or stored for use or consumption in this state, provided that there shall be no duplication of the tax.

La. Rev. Stat. § 47:305(E) provides:

> E. It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.
>
> * * * *

18 U.S.C. § 1702 provides:

> **§ 1702. Obstruction of correspondence**
>
> Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1708 provides:

> **§ 1708. Theft or receipt of stolen mail matter generally**
>
> Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or
>
> Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or
>
> Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—
>
> Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

D.H. Holmes Company, Limited, is a Louisiana corporation with its principal place of business and registered office in New Orleans, Louisiana. Holmes has department stores in various locations within Louisiana, as well as in other states (J.A. 68, 78, 81, 82).[2]

The Louisiana Department of Revenue and Taxation (hereafter "Louisiana" or the "State") audited Holmes' sales/use tax returns for the calendar years 1979, 1980 and 1981. The State assessed Holmes for delinquent use taxes on the value of the catalogs designed, printed and mailed directly from outside Louisiana to the mailboxes

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[2] Appellant's record citations refer solely to the Joint Appendix (J.A.) and its Jurisdictional Statement Appendix (J.S.App.) where the page of the record or transcript have been reproduced therein. Appellant cites to the transcript (Tr.) and the record (R.) only when the referenced material is not reproduced in the Joint Appendix or the Jurisdictional Statement Appendix.

of Louisiana residents. Holmes protested the State's proposed use tax assessment on the value of these catalogs, and the State filed suit (J.A. 2-10).

Holmes answered the suit, expressly alleging that the application of the Louisiana use tax statutes in imposing a tax on the catalogs violated the Commerce Clause of the United States Constitution (J.A. 11-13). Holmes subsequently filed a motion for summary judgment challenging application of the statute on this constitutional ground (J.A. 14). The trial court denied Holmes' summary judgment motion on March 16, 1984 (J.A. 15).

The Civil District Court for the Parish of Orleans tried the case on March 19-20, 1985. At trial, the following testimony and evidence was presented.

During the calendar years 1979, 1980 and 1981, Holmes, as a member of Frederick Atkins Buying Organization, a trade organization through which Holmes and other retailers receive various benefits, including reduced catalog design and printing rates (J.A. 70-71), contracted with New York professionals to design merchandise catalogs (J.A. 80, 85, 87, 88). As Holmes' contract through the buying organization is with the New York catalog design professionals, not with individual printers, it had no direct control over where the catalogs were printed. Rather, the New York catalog design professionals contract with and arrange for the printing of catalogs (J.A. 87). Pursuant to this arrangement, the New York catalog designer had Holmes' catalogs printed in Oklahoma City, Boston, or Atlanta (J.A. 80, 85). The printers then addressed the catalogs (J.A. 81), arranged for bulk rate postage (J.A. 74, 81, 91), and mailed them at their respective local offices of the United States Postal Service, postage prepaid, directly to select residents of Louisiana, Mississippi, Alabama, and Florida

(J.A. 73, 74, 81). Holmes later reimbursed the cost of postage (J.A. 91).[3]

The printers mailed most of the catalogs, approximately 82 percent, from their respective locations in Oklahoma City, Boston, or Atlanta directly to Louisiana residents (J.A. 80-81). The printers mailed approximately 18 percent of the catalogs to residents of other states (*id.*). A small number of the catalogs, approximately, one thousand, were delivered to Holmes in New Orleans (*id.*). The purpose of the catalogs was to promote Holmes' merchandise and name and to generate sales (J.A. 71). Holmes absorbed the entire cost of these catalogs, including the cost of mailing; the recipients received the catalogs free of charge, as Holmes has a policy against selling merchandise catalogs (J.A. 82-83). Holmes ordered merchandise catalogs in 1979 at a cost of $520,000, in 1980 for $670,000 and in 1981 for $834,000 (J.A. 85).

The testimony of Holmes' witnesses demonstrated that at no time did Holmes or any of its agents or employees receive or take possession of the catalogs mailed to recipients from Oklahoma City, Boston, or Atlanta (J.A. 81, 87). If the recipient no longer resided at the address on the catalog, the Postmaster was instructed to leave the catalog with the current resident (J.A. 75-76). Even the State's principal witness, Mr. Roy C. Bradley, the Director of the Sales Tax Section of the Louisiana Department of Revenue (Tr. 13-14) agreed that after the out-of-state printers placed the catalogs in the mail, Holmes had no control over them (J.A. 57). He also conceded that after the catalogs are in the United States Mail, they are not in the possession of Holmes (J.A. 59). He further agreed that after the

[3] The State's allegation that Holmes had the catalogs printed and mailed outside Louisiana specifically to avoid the use tax, Appellee's Motion to Dismiss or Affirm, p. 2, has no factual basis and is not supported by the record.

catalogs are accepted by the recipients from the mail, they belong to the recipients, not to Holmes (J.A. 64).

Nevertheless, Bradley claimed that Holmes was responsible for the tax. He testified that Holmes causes the catalogs to be imported into Louisiana in furtherance of its business (J.A. 56-57). Despite his concession that Holmes had no *possession* over the catalogs in Louisiana, he testified that he believed Holmes *owned* the catalogs at the time they were placed in the recipients' mailboxes (J.A. 61-62, 63, 64). Bradley testified that the taxable moment occurs when the catalog is taken out of interstate commerce (J.A. 62-63), and that Louisiana considers this taxable moment to be the time the catalogs are placed in the recipients' mailslots or mailboxes (J.A. 59, 60).

Holmes paid no taxes on the catalogs in question in the states where they were designed and printed (J.A. 69, 85-86). However, Holmes pays substantial taxes to the State of Louisiana, including sales, use, franchise, rental, and income taxes (J.A. 54, 65-66, 82, 98). Holmes collects and remits to the state sales tax on items purchased as a result of the catalogs (J.A. 65, 82). Holmes paid income taxes to Louisiana in 1979, 1980, and 1981, respectively, on income of $6.35 million, $9.06 million, and $8.20 million (J.A. 98).

Holmes repeatedly challenged the constitutionality of the use tax statutes before, during and after trial. Before trial, in addition to its motion for summary judgment raising this issue (J.A. 14), Holmes preserved its constitutional objection in its pre-trial memorandum (R. Vol. 1, Holmes' "Pre-Trial Memorandum," 1-3). During the trial, Holmes moved for a directed verdict based on the unconstitutionality of the Louisiana statutes as applied (J.A. 94-98). Holmes' motion was denied by the trial court (J.A. 98). Holmes' post-trial memorandum also preserved the constitutional issue (R. Vol 1, Holmes' "Post-Trial Memorandum").

Nevertheless, on July 19, 1985, the trial court rendered judgment in favor of the State (J.S.App. 12A-15A). In its "Reasons for Judgment," the trial court found that the catalogs were taxable by the State, "[o]nce the catalogs reach the residences of the prospective customers to whom they are addressed" (J.S.App. 22A). The trial court concluded that applying the state statutes to tax the catalogs did not unconstitutionally burden interstate commerce under this Court's ruling in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) (J.S.App. 21A-22A).

Holmes appealed the trial court's decision to the Louisiana Court of Appeal, Fourth Circuit. The Fourth Circuit's decision, rendered on March 16, 1987, affirmed the trial court's ruling. *McNamara v. D.H. Holmes Co., Ltd.*, 505 So.2d 102, 105-06 (La. App. 4th Cir. 1987) (J.S.App. 2A-10A). The appellate court, like the trial court, found that after the catalogs were placed in the *mailboxes* of the Louisiana recipients, they were no longer part of interstate commerce and could be taxed under the Louisiana use tax statutes as part of Holmes' "property mass" located in the state (J.S.App. 7A). The state appellate court analyzed the application of the tax statutes under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and *Department of Revenue of State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978), finding that the application of the taxing scheme did not violate the Commerce Clause (J.S.App. 2A-10A). The Court of Appeal found that the tax was not within the exemption provided by La. Rev. Stat. § 47:305(E) "on bona fide interstate commerce." (J.S.App. 8A-9A).

Having no further right of appeal under Louisiana law, Holmes filed an application for a writ of certiorari with the Supreme Court of Louisiana urging, *inter alia*, the unconstitutionality of the use tax statutes as applied. On May 29, 1987, the Supreme Court of Louisiana,

by a 4-3 vote, refused to exercise its discretionary jurisdiction, denying Holmes' application for a writ of certiorari. 506 So.2d 1224 (J.S.App. 11A).

Holmes timely filed its notice of appeal to this Court (J.S.App. 24A-26A, 27A-31A). Holmes filed its Jurisdictional Statement with the Court on August 14, 1987. This Court noted probable jurisdiction on November 2, 1987.

SUMMARY OF ARGUMENT

The State contended, and the courts below found, that it could assess its "use tax" against Holmes with regard to the merchandise catalogs shipped to Louisiana recipients via the United States Mail from out-of-state printers, because the catalogs were no longer part of interstate commerce at the time they were placed in the recipients' mailboxes. The courts below then found that the Louisiana use tax statutes, as applied to tax the catalogs at the recipients' mailboxes, did not unduly burden interstate commerce under the test enunciated by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and *Washington Revenue Department v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978).

The Louisiana courts erred as a matter of law in sustaining the tax assessment on the catalogs against Holmes' Commerce Clause constitutional challenge:

A. The Louisiana courts erred as a matter of *federal* law in characterizing the tax as one on goods no longer in interstate commerce. The State urged, and the Louisiana Court of Appeal found, that the taxable moment to the *sender* was when the catalogs were placed in the *recipients' mailboxes*. This Court's jurisprudence has considered an item sent in the course of interstate commerce as part of interstate commerce for its entire journey until accepted by the recipient. Also, United States statutory law protects items placed in a recipient's mailbox as an integral part of interstate commerce. As a

matter of *federal* law, Holmes does not have, and cannot legally have, possession or control over the catalogs at the time they are in the recipients' mailboxes. At the time Louisiana taxed the catalogs, *they were goods in interstate commerce*, not part of Holmes' mass of property located in Louisiana.

B. The Louisiana Courts erred in analyzing the constitutionality of the Louisiana tax scheme under the test enunciated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Because the free flow of goods between the states is the heart of what the Commerce Clause protects, this Court, in a long line of cases, has prohibited *all* direct state taxation of *goods* while in the stream of commerce. Several state court decisions, including some virtually identical to the facts of this case, also have recognized that the Commerce Clause strictly prohibits the taxation of goods in the stream of commerce. Neither *Complete Auto* nor its Supreme Court progeny have sought to adjudge the Commerce Clause constitutionality of a tax imposed directly on *goods* in the stream of commerce. The Court should not extend the application of the *Complete Auto* test to such taxes, as that test does not adequately evaluate the burden such taxes place on interstate commerce. The Louisiana tax statutes, unlike past use tax cases considered by this Court, impose a direct tax on goods in interstate commerce by taxing not merely an *activity tangential* to the movement of goods in interstate commerce but the *goods actively* in interstate commerce. The Court, consistent with its past refusal to allow such taxation, should invalidate the Louisiana tax statutes as applied.

C. Alternatively, the Louisiana tax statutes as applied violate the Commerce Clause, even if *Complete Auto* and its progeny apply. The first part of the *Complete Auto* test requires that the *activity* sought to be taxed must have a substantial nexus with the taxing state. Assuming that the Louisiana tax impacts an *activity* (it does

not, see Arguments A and B), the "activity" taxed does not have any substantial relation to Louisiana. The catalogs are designed, printed, addressed and distributed by mail from outside Louisiana. Furthermore, Holmes has no possession or control over the catalogs while they are in Louisiana. Thus, the impact of the Louisiana use tax statutory scheme is to impose an impermissible sales tax on goods sold outside Louisiana.

Furthermore, this Court has never held that the *Complete Auto* test provides the only criteria for evaluating the Commerce Clause constitutionality of a state taxing scheme. The ultimate question is whether the tax unduly burdens interstate commerce. The Louisiana use tax statutes as applied unduly burden interstate commerce by artificially vesting an "ownership" interest in the *sender* at the *recipient's mailbox* while the goods still form part of interstate commerce, but long after the sender has relinquished all possession and control thereof. Thus, the Louisiana tax statutes as applied allow the State to tax *directly* all senders of advertising materials and commercial correspondence sent in interstate commerce through the United States Mail, even though the goods sent have no connection with the State other than the fact they are sent to a Louisiana resident. The impact of upholding this onerous Louisiana tax concept is to allow taxation *of the sender* on *all items* sent in interstate commerce to Louisiana residents via the United States Mail or another common carrier. Other state and local taxing jurisdictions then will be free to interpret similarly their tax statutes, severely burdening interstate commerce. This Court should invalidate this onerous Louisiana taxing concept as imposing an undue burden on interstate commerce, regardless whether the tax would pass the *Complete Auto* test.

ARGUMENT

THE LOUISIANA USE TAX STATUTES, AS APPLIED TO ASSESS HOLMES WITH A TAX ON CATALOGS MAILED DIRECTLY FROM OUT-OF-STATE PRINTERS TO THE MAILBOXES OF LOUISIANA RECIPIENTS, IMPERMISSIBLY BURDENS INTERSTATE COMMERCE BY DIRECTLY TAXING *GOODS* IN INTERSTATE COMMERCE

A. Holmes had no possession or control over the catalogs in Louisiana; the Louisiana statutes, as applied in this case, directly taxed *goods* in interstate commerce

The trial evidence demonstrates that Louisiana assessed Holmes with a tax on the catalogs at the time the catalogs were placed by the United States Postal Service in the recipients' mailboxes. Mr. Roy C. Bradley, Director of the Sales Tax Division of the Louisiana Department of Revenue and Taxation, testified that Louisiana considers its use tax imposed against Holmes on the catalogs at the time the catalogs are delivered to the recipient's mailbox, even though the State acknowledges that Holmes had no possession or control over the catalogs at that point:

> CROSS-EXAMINATION BY MR. GRACE:
>
> * * *
>
> Q. . . . The question I have for you, Mr. Bradley, do you agree that the catalogs, which are the subject of this controversy, come to rest in Louisiana when they are received by the residents of Louisiana?
>
> A. Yes, when they are placed in a mailbox, I assume.
>
> Q. And this is the point in time which the State considers the tax to be imposed when they are delivered to the Louisiana residents' homes?
>
> A. Yes, at the time they are delivered.

Q. Do you agree that at no time while those catalogs are in the United States mail that those catalogs are in the possession of D.H. Holmes?

A. That's right.

THE COURT:

You mean the physical possession?

MR. GRACE:

Yes, sir.

THE WITNESS:

Right.

(J.A. 59).

Based on the State's position, the Louisiana Court of Appeal found that the recipients' *mailboxes* constituted the taxable moment:

> After the catalogs were in Louisiana mailboxes, they were not part of interstate commerce and became part of the property mass in this state.

(J.S.App. 7A).

The Louisiana court erred as a matter of *federal* law in finding that the catalogs were no longer part of interstate commerce at the time they were placed in mailboxes of the Louisiana recipients. Clearly, the catalogs, designed in New York and printed in and mailed to Louisiana from Massachusetts, Oklahoma, and Georgia, formed part of interstate commerce. A product crossing a state line at any stage of its journey is in interstate commerce for its entire journey. *E.g., Maryland v. Louisiana*, 451 U.S. 725, 755 (1981). This Court has considered a product as remaining in interstate commerce until ultimate delivery to the recipient. *See, e.g., Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (goods considered to have ended their journey in commerce where they reached a warehouse from which petitioner conducted a wholesale operation); *Adams Express Co. v. Kentucky*, 206 U.S. 129, 136 (1907) (goods considered in interstate commerce until delivery to the consignee). Specifically with regard to use taxes, this Court has implied that delivery to the consignee so as to withdraw the item from interstate commerce must be unequivocal; the Court stated: "A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the [out-of-state] sale itself." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583 (1937).

Furthermore, the postal statutes, consistent with this Court's jurisprudence, establish that the journey of goods mailed in interstate commerce is not complete until goods are *retrieved* by the recipient and *accepted* from his mailbox. *See* 18 U.S.C. § 1702 (protecting goods mailed until delivered "to the person to whom it was directed"); § 1708 (protecting against theft of mail from, *inter alia*, "letter box[es]," and "mail receptacle[s]"). As the Eighth Circuit noted in *United States v. Ashford*, 530 F.2d 792 (8th Cir. 1976), Section 1702 protects mailed items until "the mailed material is physically delivered to the person to whom it is directed or to his authorized agent. . . ." *Id.*, 530 F.2d at 795. Thus, the mailman's action in placing the catalog in the recipient's mailbox does not bring the catalog's interstate journey to an end. Not until the recipient removes it from the mailbox is its interstate journey complete.

Louisiana applied its use tax statutes in this case to impose a tax on Holmes and the catalogs long after Holmes' out-of-state printers had relinquished all possession and control over the catalogs to the United States Postal Service for their interstate journey to Louisiana recipients. This "mailbox" use tax clearly imposes a tax on *goods* while they are still in the course of interstate commerce. As submitted below, this Louisiana "mailbox" use tax statutory scheme unconstitutionally burdens interstate commerce.

B. The Louisiana "mailbox" use tax scheme unconstitutionally imposes a tax on goods in interstate commerce; the Court of Appeal erred in adjudging the constitutionality of the tax under the guidelines enunciated in *Complete Auto Transit, Inc. v. Brady*

1. *This Court's well-established jurisprudence strictly prohibits the taxation of goods in interstate commerce*

This Court long ago established that goods are immune from taxation while in the course of interstate commerce. In *Coe v. Town of Errol*, 116 U.S. 517 (1886), the Court held that once goods begin an interstate journey, they are immune from taxation until they end their journey. Subsequent cases have reaffirmed this principle. *See, e.g., Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70, 72-73 (1947), *quoting from Minnesota v. Blasius*, 290 U.S. 1, 9, 10 (1933) (quoted in Appellant's Jurisdictional Statement, p. 10).

The Court's recent jurisprudence has reconfirmed the continued protection from taxation afforded to goods while in the course of commerce. In *Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974), the Court reaffirmed this fundamental constitutional protection relying on *Coe v. Town of Errol*. *Kosydar*, 417 U.S. at 66-67. In *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 302 (1976), this Court again noted the continued protection afforded to goods while in the course of commerce.

The protection of goods from taxation while in interstate commerce is the heart of the protection afforded by the Commerce Clause. The Framers sought to preserve interstate commercial intercourse from the barriers imposed by state taxation of goods in commerce. As this Court recently noted in *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986):

> As we have previously observed, "The few simple words of the Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979). In recognition of the importance of this conviction, we have acknowledged the self-executing nature of the Commerce Clause and held on countless occasions that even in the absence of specific action taken by the Federal Government to disapprove of state regulation implicating interstate or foreign commerce, state regulation that is contrary to the constitutional principle of ensuring that the conduct of the individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States, may be invalid under the unexercised Commerce Clause.

Wardair, 477 U.S. at ——, 91 L.Ed.2d at 9; *see also Michelin v. Wages*, 423 U.S. at 283 ("One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign commerce very much as they pleased.").

Furthermore, the protection from taxation afforded to goods while in interstate commerce applies whether or not the goods in commerce are "owned" by a resident of the taxing jurisdiction:

> That denial [to the states of the power to tax goods while in the course of interstate commerce] rests upon the supremacy of the Federal power to regulate interstate commerce. Its postulate is the necessary freedom of that commerce from the burden of such local exactions as are inconsistent with the control and protection of that power. *The fact that such a burden is sought to be imposed by the state of the domicil of the owner, upon property moving in inter-*

> *state commerce, creates no exception. That state enjoys no prerogative to make levy upon such property passing through it, because it may belong to its citizens.* They, as well as others, are under the shelter of the commerce clause. The question is determined not by the residence of the owner, but by the nature and effect of the particular state action with respect to a subject which has come under the sway of a paramount authority.

Bacon v. Illinois, 227 U.S. 504, 511-12 (1913) (emphasis added).

Consistent with this Court's jurisprudence, several recent state court decisions recognize that the Commerce Clause prohibits the states from imposing a direct use tax on *goods* while forming part of interstate commerce.

The leading state court case, *Service Merchandise Co., Inc. v. Tidwell*, 529 S.W.2d 215 (Tenn. 1975), involves a fact setting virtually identical to the present case. There, Service Merchandise, a merchant doing business in Tennessee, had catalogs and other advertisement material designed and published in Minnesota for delivery to Tennessee recipients. Some of the materials were addressed and mailed directly by the printer from Minnesota. Other materials were addressed by the printer and sent by common carrier (truck) to post offices in Tennessee, where the materials were mailed to Tennessee residents. Still other materials were trucked by the printer to a packaging company in Illinois, where each piece was wrapped and addressed before being trucked by common carrier to Tennessee, where they were placed in the mail for delivery to Tennessee recipients. Tennessee sought to assess Service Merchandise with a use tax on the advertisement materials. The Tennessee Supreme Court found the state's attempt to tax the advertisement materials impermissible under the Commerce Clause, as they were in interstate commerce from the time of their original out-of-state shipment until delivery to the Tennessee recipients. *Id.*, 529 S.W.2d at 218-20.

Likewise, other state court cases have recognized the Commerce Clause protection from state and local taxation afforded to goods in transit in interstate commerce. *See, e.g., Deere & Co. v. Allphin*, 49 Ill. App. 3d 164, 7 Ill. Dec. 130, 364 N.E.2d 117, 120-21 (Ill. App. Ct. 3d Dist. 1977) (goods in question were found taxable as they had come into possession of the taxpayer outside of interstate commerce; the court recognized *Service Merchandise* as distinguishable); *LeTourneau Sales & Service, Inc. v. Olsen*, 691 S.W.2d 531, 537 (Tenn. 1985) (the court recognized the *Service Merchandise* holding, but found the case before it distinguishable as goods came to rest in the state where a taxable service was performed); *Board of Publication of the Methodist Church, Inc. v. Woods*, 609 S.W.2d 501 (Tenn. 1980) (the court recognized *Service Merchandise* but found the facts distinguishable as a sale occurred in Tennessee and the goods were taxed before they entered interstate commerce); *see also District of Columbia v. W. Bell & Co.*, 420 A.2d 1208, 1210-11 (D.C. 1980) (while the court decided the case on statutory grounds, thus avoiding the constitutional question, the court found that catalogs sent in interstate commerce from outside the District of Columbia by a District of Columbia merchant to District of Columbia recipients were not subject to the District's use tax); *Bennett Brothers, Inc. v. State Tax Commission*, 62 A.D.2d 614, 405 N.Y.S.2d 803 (N.Y. App. Div. 3d Dep't 1978) (New York court rejected the State's attempt to impose use tax on catalogs printed and mailed from out-of-state to New York recipients as the New York merchant had insufficient possession and control over the catalogs to justify imposition of the tax); *Hoffman-LaRoche, Inc. v. Porterfield*, 16 Ohio St. 2d 158, 45 Ohio Ops. 2d 486, 243 N.E.2d 72 (1968) (advertisement materials mailed from outside Ohio to Ohio recipients not subject to assessment of Ohio use tax; the court rejected the contention that the right to recall mailed materials under postal regulations vested possession of the goods in

the sender in Ohio sufficient to impose the tax); *Sears, Roebuck & Co. v. Lindley*, 70 Ohio St. 2d 249, 24 Ohio Ops. 3d 339, 436 N.E.2d 1029 (1982) (Ohio could not constitutionally impose its sales tax on catalogs printed and delivered out-of-state for distribution to Ohio recipients); *Modern Merchandising, Inc. v. Department of Revenue, State of South Dakota*, 397 N.W.2d 470 (S.D. 1986) (while not reaching the constitutional issue, the court found that South Dakota's use tax could not be applied to catalogs shipped on behalf of a mail order merchant doing business in South Dakota from out-of-state directly to South Dakota recipients; the court found insufficient possession for taxation in South Dakota as control of the catalogs within the state belonged either to the Post Office or to the advertisement recipient); *Wisconsin Department of Revenue v. J.C. Penney Co., Inc.*, 108 Wis. 2d 662, 323 N.W.2d 168 (1982) (the court found that Wisconsin could not tax catalogs sent by Penney from Indiana to Wisconsin; while the court did not reach the Commerce Clause issue, the court found that the catalogs remained the property of the printer until delivered to the recipient and that Penney had insufficient possession or control over the catalogs to support the imposition of the tax).

Similarly, the Louisiana "mailbox" use tax scheme in this case violates the Commerce Clause, because the catalogs upon which Louisiana assessed its use tax had not exited the course of commerce, as required by this Court's jurisprudence, and were not in Holmes' possession or control at the time the State imposed its tax.

2. *The Louisiana Court of Appeal erred in evaluating the Commerce Clause constitutionality of the Louisiana tax statutes under the four part* Complete Auto *test*

The Louisiana Court of Appeal evaluated the constitutionality of the Louisiana tax statutes under the four-part test enunciated in *Complete Auto Transit, Inc. v.*

Brady, 430 U.S. 274 (1977). The history of *Complete Auto* and its progeny demonstrates that this Court has never applied the *Complete Auto* test in upholding the constitutionality of a *direct* tax on *goods* still forming part of interstate commerce.

In *Complete Auto*, the Court addressed whether Mississippi could assess its sales tax on transportation services provided by Compete Auto in trucking new automobiles to Mississippi dealers from Jackson, Mississippi, where they were delivered from out-of-state by rail. In finding Complete Auto's transportation *activity* was not protected from taxation by the Commerce Clause, the Court enunciated a four-part test: (1) the *activity* sought to be taxed must be sufficiently connected with the state to justify the tax, (2) the tax must be fairly apportioned, (3) the tax must not discriminate against interstate commerce, and (4) the tax must be fairly related to benefits afforded the taxpayer. *Id.*, 430 U.S. at 287. Significantly, the Court was not presented with and did not address the question whether this test applied in determining the constitutionality of a direct tax on *goods* while in the course of interstate commerce.

Nor has this Court applied this test in any case where at issue was the constitutionality under the Commerce Clause of a *direct* tax on goods while still in the course of interstate commerce.[4]

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[4] *See Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978) (the *Complete Auto* test applied in assessing whether a business and occupation tax on stevedoring activities violated the Commerce Clause); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (the *Complete Auto* test plus additional factors considered in determining whether a property tax on cargo containers used in foreign commerce but temporarily located in California on "tax day" violated the Commerce Clause); *Exxon Corporation v. Wisconsin Department of Revenue*, 447 U.S. 207 (1980), and *Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980) (*Complete Auto* test applied in determining whether apportioned state income taxes violated the Commerce

Only one case decided after *Complete Auto, National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), discusses the *Complete Auto* test in a fact setting remotely analogous to the present case. There, the Court applied the *Complete Auto* test in evaluating whether California, where National Geographic had offices engaged solely in soliciting advertisement for its magazine, could require National Geographic to collect the use tax owed by California mail order purchasers of National Geographic goods from National Geographic's East Coast mail order business.

However, not even *National Geographic* presents the issue involved in this case. There the Court applied the *Complete Auto* test in evaluating the constitutionality of the *activity* of requiring National Geographic to collect a use tax *owed by others*. The Court did not apply the *Complete Auto* test in evaluating the constitutionality of a direct tax imposed on National Geographic. In the present case, Louisiana's statutory tax scheme, as applied, imposed a *direct use tax* on Holmes on the catalogs its printers shipped in interstate commerce, not an indirect duty to collect a tax owed by someone else.

Furthermore, the *National Geographic* Court expressly found that the fact situation presented there differed from a *direct* tax fact situation as presented in this case:

Clause); *Commonwealth Edison Co. v. State of Montana*, 453 U.S. 609 (1981) (*Complete Auto* applied in determining whether severance tax on coal mined in Montana violated the Commerce Clause); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (*Complete Auto* test discussed in determining whether severance tax imposed by Indian tribe violated the Commerce Clause); *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986) (the Court noted, without discussing, the *Complete Auto* test in evaluating whether a Florida tax on aviation fuel sold in Florida to a Canadian airline violated the Commerce Clause); *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. ——, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987) (Court applied *Complete Auto* test in determining whether tax imposed on operation of trucks over the state's highways violated the Commerce Clause).

> However fatal *to a direct tax* a "showing that particular transactions are dissociated from the local business . . . ." Norton Co. v. Illinois Rev. Dept., [340 U.S. 534] at 537 [(1951)]; American Oil Co. v. Neill, [380 U.S. 451 (1965)]; Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938), such dissociation does not bar the imposition of the use-tax-collection duty.

National Geographic, 430 U.S. at 560 (footnote omitted; citation material in brackets added; emphasis added). Thus, *National Geographic* implies that even after *Complete Auto*, there is no need to apply the *Complete Auto* test to such a direct tax on goods in interstate commerce, as such taxes are *per se* violative of the Commerce Clause. *See* Argument B.1, *above*.

Nor should the Court extend application of the *Complete Auto* test to direct taxes on goods in interstate commerce. The free movement of goods between the states is the heart of what the Commerce Clause seeks to protect. Ensuring the free movement of goods in commerce was one of the compelling reasons, if not the paramount reason, leading to the Constitutional Convention, and ultimately, to the establishment of the United States under a federal form of government. *See Wardair*, 477 U.S. at —, 91 L.Ed.2d at 9; *Michelin*, 423 U.S. at 283. While some state taxation may be permissible on goods, *before* and *after* their transit in the stream of interstate or foreign commerce, and while some state taxation may be permissible on *activities* in interstate commerce conducted within the borders of each individual taxing state, the free movement of goods can only be protected if the states are prohibited from directly taxing goods while in the course of interstate commerce.

The *Complete Auto* test, while useful in evaluating the burden placed on commerce by taxes tangentially related to interstate commerce, such as taxes on fuel and vehicles used to transport goods and taxes on the goods

themselves before and after their journey in interstate commerce, does not protect the free flow of interstate commerce where the tax in question is directly aimed at *goods* while they form part of interstate commerce. A tax on goods while in interstate commerce, even passing all four parts of the *Complete Auto* test, nevertheless imposes a devastating burden on interstate commerce. *See* Argument C.2, *below*, discussing the burden the present tax places on interstate commerce. Indeed, every state through which goods pass can claim some significant relationship between the goods and the state; also, the tax on the goods, on its face, may be apportioned and nondiscriminatory and may facially be related to services provided to the taxpayer in the state. Nevertheless, interstate commerce is burdened, because the tax is on the *goods* forming part of an interstate journey, which forms the essence of commerce. If allowed here, such taxes may be assessed by every state touched by the goods, even though the only relationship between the goods and the taxing state is interstate commerce. Allowing such taxation necessarily puts goods marketed between states at the disadvantage that the Framers sought to protect against in adopting the Commerce Clause. Also, allowing such taxation in this case will invite a tangled web of state and local "mailbox" taxation, severely burdening the flow of goods in commerce. The extension of the *Complete Auto* test to direct taxes on goods while forming part of interstate commerce will only provide the states with the methodology to mask as legitimate unconstitutional taxation imposing a direct burden on the free flow of commerce. This Court should not extend application of the *Complete Auto* test to direct taxes on goods in interstate commerce; the free movement of goods in interstate commerce is assured only by maintaining the long-established absolute prohibition against direct taxation of goods in the stream of interstate commerce.

3. *The Louisiana use tax statutes, as applied in this case, tax goods in interstate commerce in violation of the Commerce Clause*

Louisiana applied its use tax statutes to assess Holmes with a tax on the merchandise catalogs while the catalogs still formed part of interstate commerce as part of the United States Mail. *See* Argument A, *above*. This "mailbox" use tax scheme is dissimilar to the use taxes discussed in past cases decided by the Court. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Monamotor Oil Co. v. Johnson*, 292 U.S. 86 (1934); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Nelson v. Montgomery Ward & Co., Inc.*, 312 U.S. 373 (1941).

Henneford and *Monamotor* upheld use taxes on property in the possession of the taxpayer which had come to rest as part of the mass of property in the state at the time the state imposed the use tax. In the present case, at the time Louisiana imposed its use tax, the catalogs were not in possession of Holmes and were still goods in interstate commerce.

Nor is this case like *Nelson v. Sears* or *Nelson v. Montgomery Ward* where the state imposed upon a local merchant a duty to collect a use tax *owed by others* resulting from the merchant's out-of-state sales shipped to residents in the taxing jurisdiction. In those cases, as in *National Geographic*, discussed above, the taxable incidence was on the *recipient* of the goods, not the *sender*, and occurred while the recipient had possession and control over the goods in the taxing state. This case involves a direct tax assessed against Holmes as an out-of-state sender, not the catalog recipients, and is assessed on the catalogs *before* they have completed their journey in interstate commerce.

This Louisiana "mailbox" use tax statutory scheme is unconstitutional as applied in this case, because it directly taxes goods while they still are in interstate

commerce contrary to this Court's established jurisprudence. Accordingly, this Court should reverse the judgment of the Louisiana Court of Appeal.

C. Alternatively, even if the *Complete Auto* test applies in assessing whether the Louisiana use tax statutes violate the Commerce Clause, the tax statutes, as applied in this case, unduly burden interstate commerce and are unconstitutional

1. *The Louisiana Court of Appeal misapplied the* Complete Auto *test; the "activity" sought to be taxed does not have a substantial relationship to Louisiana*

Even assuming that the *Complete Auto* test applies here, the Louisiana use tax statutory scheme, as applied to this case, violates the Commerce Clause. The Louisiana Court of Appeal misapplied the first part of the *Complete Auto* test. While the first part of the *Complete Auto* test focuses on whether the *activity* sought to be taxed is sufficiently connected with the state to justify a tax, *see Complete Auto*, 430 U.S. at 287, the Louisiana Court of Appeal erroneously focused on the relationship between *taxpayer* and the state. The Court of Appeal found:

> A state tax can survive a Commerce Clause challenge if the tax: (1) is applied to an activity with a substantial nexus with the taxing state . . .
>
> The nexus requirement is met because Holmes operates 13 stores intrastate. It has approximately 5,000 Louisiana employees, 500,000 charge customers, and 1,500,000 customers within the state. 82% of the catalogs were mailed into Louisiana and 1,000 were distributed from the Canal Street store.

(J.S.App. 8A-9A).

Holmes does not dispute that *it* has a substantial connection with Louisiana, as found by the Court of Appeal. However, this finding begs the question, as *Complete Auto* test also requires a *substantial* relationship between the *activity* sought to be taxed and the state. *See also*

American Oil Co. v. Neill, 380 U.S. 451, 457 (1965) (noting that this Court has struck down tax statutes on out-of-state sales insufficiently related to the taxpayer's activities in the state).

The only connection between the "82% of the catalogs" which are the subject of this case and Louisiana is that the catalogs were sent via interstate commerce directly to the mailboxes of Louisiana recipients. However, the catalogs were designed in *New York*, not *Louisiana*. They were printed, addressed, and mailed from *Georgia*, *Massachusetts*, and *Oklahoma*, not *Louisiana*. Clearly, as the activities regarding these catalogs occurred in New York, Georgia, Massachusetts, and Oklahoma, these states had the constitutional power to tax the catalogs. However, once the catalogs were mailed from outside Louisiana, Holmes had no possession or control over them. Neither the catalogs nor the activity of mailing them had any substantial relationship with Louisiana justifying a use tax on the catalogs consistent with the Commerce Clause.

This absence of a relationship between the "activity" and the State renders the Louisiana taxing scheme, as applied, unconstitutional. Furthermore, this Court's jurisprudence provides that the Court, in assessing the constitutionality of a tax statute, will look to the impact of the tax, not the label placed thereon by the taxing state. *See, e.g., American Oil v. Neill*, 380 U.S. at 455; *Nelson v. Sears*, 312 U.S. at 363. As neither the printing, addressing, or distributing by mail of the catalogs had any relationship to Louisiana, and since Holmes never had possession or control over the catalogs in Louisiana, the practical effect of the State's use tax statutes was to impose an impermissible *sales* tax on catalogs "purchased" out of state. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944); *see also Evco v. Jones*, 409 U.S. 91, 93 (1972) (gross receipts tax on sales of property in another state imposes an impermissible burden on interstate commerce).

The catalogs lacked the substantial relationship with Louisiana required by the *Complete Auto* test, even assuming that that test applies in this case. Further, the impact of the assessment against Holmes is impermissibly placed on transactions and activities that occurred in other states. The Court should reverse the judgment of the Court of Appeal.

2. *The* Complete Auto *test does not exclusively define the parameters of taxation permissible under the Commerce Clause; notwithstanding the* Complete Auto *test, the Louisiana use tax statutes, as applied, violate the Commerce Clause by promoting the "economic Balkanization" that the clause was aimed at prohibiting*

This Court has never held the four part test to provide the *only* factors to be considered in assessing the constitutionality of state tax statutes under the Commerce Clause. Both before and after the *Complete Auto* decision, the ultimate determinative factor, and the factor which the *Complete Auto* test was aimed at determining, is whether the state tax statute impermissibly and unduly burdens interstate commerce. *See, e.g., Wardair v. Florida*, 477 U.S. at ——, 91 L.Ed.2d at 9-10 (the purpose of the Commerce Clause is to insure that state regulation "does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States . . ."); *Washington Stevedoring*, 435 U.S. at 748 (a tax may impermissibly burden interstate commerce when it exacts more than a just share from the interstate activity); *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967) (taxation on mail order sales unduly burdens interstate commerce where the taxpayer had no other connection with the taxing state).

The Court has not hesitated to go beyond the *Complete Auto* test where the factors enunciated therein insufficiently gauged whether the effect of a state taxing scheme placed on commerce was unduly burdensome. In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), for example, because the *Complete Auto* test insufficiently measured the burden placed by a tax where foreign commerce was involved, the Court added two additional factors in finding a Los Angeles property tax on cargo containers used in foreign commerce unconstitutional. Similarly, the Court considered the two additional *Japan Line* factors in *Wardair v. Florida*, 447 U.S. 1, in upholding the constitutionality of a Florida fuel tax imposed on fuel sold to an international air carrier in Florida.

If the *Complete Auto* test applies at all here, this Court should look beyond that test in adjudging the constitutionality of this Louisiana "mailbox" use tax scheme and other tax schemes directly taxing goods in interstate commerce. As applied by the State and as interpreted by the Louisiana Court of Appeal, the Louisiana tax scheme rendered the catalogs taxable property belonging to Holmes only by *artificially* designating Holmes as the *owner* of the catalogs when they reach the recipients' mailboxes, *even though the State's own witness, the head of the State's Sales Tax Division, admitted that Holmes had no possession or control over the catalogs at this point.* United States law, discussed in Argument A, *above*, confirms that Holmes can have no real ownership, possession, or control over the catalogs while they are in the recipients' mailboxes. Yet Louisiana, by creating this artificial "mailbox ownership" concept, taxed the catalogs and assessed Holmes.

This Court should strike down this onerous Louisiana taxation concept because of the overwhelming burdens it places on interstate commerce. By defining ownership in the *sender* at the *recipient's mailbox*, the State, through its use tax statutes, can impose a tax on every catalog, every advertisement flyer, indeed on every piece of commercial correspondence and item sent to a Louisiana addressee.

While the impact of the Louisiana tax statutes on interstate commerce between other states and Louisiana

alone is staggering, the Louisiana implications are but the "tip of the iceberg." At present, forty-five (45) states and the District of Columbia impose sales and use taxes. *See* R. Rotunda, J. Nowak, J. Young, 1 TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE AND PROCEDURE § 13.6(b) n.72 at 790 (1986). Additionally, there are innumerable local taxing jurisdictions in the United States.[5] If this Louisiana taxing scheme is upheld, all 45 state "use tax" jurisdictions, the District of Columbia, and all local taxing jurisdictions having a use tax will be free to interpret similarly their use taxes. The direct net effect of sustaining the tax in this case could be the imposition *at the consumer's mailbox* of a tax (or taxes) assessed against the sender on *every* piece of commercial mail sent in interstate commerce.

This Court, in striking down a mail order tax in *National Bellas Hess, Inc. v. Illinois*, 386 U.S. 753 (1967), stated:

> Indeed, it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose a "fair share of the cost of local government."
>
> The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.

Id., 386 U.S. at 759-60 (emphasis added; footnotes omitted). While this case differs in several respects from *National Bellas Hess*, the burdens on interstate commerce resulting from the Louisiana "mailbox" taxing scheme are no different. Clearly, the impact of this Louisiana taxing scheme impermissibly burdens interstate commerce.

The *Complete Auto* test inadequately adjudges the burden placed on interstate commerce when the impact of the tax is on goods still in the stream of commerce. Regardless whether such taxes satisfy the *Complete Auto* test, they directly inhibit the free flow of commerce by encouraging the "economic Balkanization" that the Framers sought to protect against. *See Wardair v. Florida*, 477 U.S. at ——, 91 L.Ed.2d at 9-10, *quoted* at pp. 16-17, *above*. The free movement of interstate commerce is severely jeopardized if every state that touches such goods is free to impose a direct tax on them. The net result is a web of state and local taxation and the resulting administrative burdens on all goods mailed in interstate commerce. This Court should strike down the Louisiana use tax statutes as applied in this case as violative of the Commerce Clause.

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[5] This Court noted in *National Bellas Hess, Inc. v. Illinois*, 386 U.S. at 759 n.12, that in 1965, over 2,300 localities imposed sales taxes, and most sales taxes are complemented by a use tax. At present, there exist approximately 6,700 taxing entities in the United States. *See* Advisory Commission on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales*, p. 47 (1986).

CONCLUSION

Holmes submits that the Louisiana "mailbox" use tax statutory scheme, as interpreted to impose a "use tax" on the catalogs mailed in interstate commerce to Louisiana recipients, impermissibly burdens interstate commerce in violation of the Commerce Clause. This Court should strike down the Louisiana tax, as applied, and reverse the judgment and opinion of the Louisiana Court of Appeal, Fourth Circuit, holding the tax statutes and tax assessment thereunder, constitutional under the Commerce Clause.

Respectfully submitted,

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